Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

Michael F. Altschul
Senior Vice President and General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Scott Bergmann
Assistant Vice President, Regulatory Affairs

Matthew B. Gerst
Counsel, External & State Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

April 25, 2011

TABLE OF CONTENTS

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010	)	CG Docket No. 10-213
	)	
Amendments to the Commission's Rules Implementing Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996	)	WT Docket No. 96-198
	)	
In the Matter of Accessible Mobile Phone Options for People who are Blind, Deaf-Blind, or Have Low Vision	)	CG Docket No. 10-145

COMMENTS OF CTIA-THE WIRELESS ASSOCIATION®

CTIA-The Wireless Association® ("CTIA")[1/] hereby submits these comments in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission" or "FCC") seeking comment on the rules that will implement the advanced communications provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010 (the "Act").[2/] The wireless industry welcomes the opportunity to provide persons with disabilities access to the innovative and

[1/] CTIA – The Wireless Association® is the international organization of the wireless communications industry for both wireless carriers and manufacturers. Membership in the organization includes Commercial Mobile Radio Service ("CMRS") providers and manufacturers, including cellular, Advanced Wireless Service, 700 MHz, broadband PCS, and ESMR, as well as providers and manufacturers of wireless data services and products.

[2/] *Implementation of Sections 716 and 717 of the Communications Act of 1934, as Enacted by the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, *et al*., Notice of Proposed Rulemaking, FCC 11-37 (rel. Mar. 3, 2011) ("NPRM"); Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260, 124 Stat. 2751 (2010) (as codified in various sections of 47 U.S.C.).

competitive wireless ecosystem. CTIA respectfully submits that the Commission must implement the Act by providing clarity in the requirements, certainty about what is covered, and flexibility in how to achieve accessibility, in order to comply with the Act. This will ensure persons with disabilities have meaningful access to innovative advanced communication services.

CTIA believes that some of the proposed rules, if adopted, could have the unintended consequence of limiting the ability of service providers and manufacturers to achieve accessibility through innovative products and services. The Commission must review its proposed rules with this potential negative outcome in mind. In particular:

- The final rules must provide covered entities the certainty that they will not be held responsible for third party entities, give independent effect to section 716(j), and ensure regulatory obligations are clear, so that covered entities can appropriately incorporate accessibility planning into the product or service's development.
- The final rules' definition of "advanced communications service" should be clearly limited to those services and equipment that are designed with the "primary purpose" of advanced communications and, in so doing, would preclude the need for an unworkable waiver process.
- The final rules must adhere to Congress' intended definition of "achievable" by maintaining the "reasonableness" framework on which the "achievable" standard is based.
- The final rules must give meaning to the "industry flexibility" provisions of the Act by ensuring that the use of third party accessibility solutions becomes a viable option for covered entities and consumers.
- The final rules' enforcement requirements should encourage the early and private resolution of complaints at every opportunity, must observe fundamental notions of due process, and adhere to established informal complaint processes.

In so doing, the Commission can implement the Act so as to best ensure continued innovation and technological progress in making modern communications accessible for all Americans.

INTRODUCTION AND SUMMARY

Innovative wireless communications products and services are making a tremendous contribution to the ways we work, live and play, especially for people with disabilities. As Congress observes, modern technology such as smart phones and global positioning systems has transformed people's lives, including "improv[ing] the communications capabilities of individuals with disabilities."[3/] The Act represents a testament to the importance that society places on access to these capabilities for all Americans, and the need to ensure that persons with disabilities share equally in these advances.

The wireless industry is dedicated to making this potential a reality by increasing the availability of innovative products and services to the accessibility community. CTIA's member companies have continuously demonstrated the innovation and competition throughout the wireless ecosystem that benefits the accessibility community. Indeed, carriers compete to offer service plans and accessible software specifically designed for persons with disabilities.[4/] Accessibility in wireless products is also increasing through the availability of "built-in" accessibility features, such as text-to-speech and screen readers, Hearing Aid Compatibility ("HAC") and compatibility with Assistive Technology ("AT"), predictive text, word completion,

---

[3/] H. Rep. No. 111–563, at 19 (2010) ("House Report"); *see also* S. Rep. No. 111–386, at 1 (2010) (noting that digital technologies "offer[] innovative and exciting ways to communicate and share information.") ("Senate Report").

[4/] *See* AT&T, Text Accessibility Plans ("TAP"), http://www.wireless.att.com/learn/articles-resources/disability-resources/disability-resources.jsp (last visited April 4, 2011); Sprint Relay Data Only Plan, http://sprintrelaystore.com (last visited April 4, 2011); *see also* Sprint – Accessibility for All, http://www.sprint.com/landings/accessibility/index.html (April 4, 2011); U.S. Cellular, Deaf and Hard of Hearing, Text-Only Calling Plans, http://www.uscellular.com/uscellular/common/common.jsp?path=/plans/text-only.html (last visited April 7, 2011); T-Mobile, Safety and Accessibility, http://www.t-mobile.com/Company/Community.aspx?tp=Abt_Tab_Safety&tsp=Abt_Sub_TTYPolicy (last visited April 7, 2011); Verizon Wireless, Nationwide Messaging Plans, http://aboutus.vzw.com/accessibility/index.html (last visited April 7, 2011).

voice-activated features and closed-captioning.[5/] Popular devices such as Apple's iPhone, Nokia's S40 phones and S60 operating system, RIM, Ltd.'s Blackberry® and Samsung's Haven offer a plethora of accessibility options for customers. For example, Apple's iPhone4 and iPhone 3GS include the "VoiceOver" screen reader, which is the "world's first gesture-based screen reader" enabling a consumer who is visually impaired to enjoy and use the iPhone.[6/] Nokia included speaking clocks, voice dialing and audio messaging into lower-cost S40 phones and installed the S60 operating system onto mid-range handsets, offering users access to third-party software developers that are creating applications to enhance accessibility.[7/] RIM, Ltd. offers the Clarity theme for BlackBerry smart phones as a free download from Blackberry App World™ that improves legibility and simplifies the user interface for customers with various visual abilities and disabilities.[8/] Samsung's Haven incorporates a digitally recorded human speech in a clear female voice that speaks everything on the phone's display, including caller ID and menu items.[9/]

[5/] *See* Apple, Inc., http://www.apple.com/accessibility/ (last visited April 7, 2011); Motorola, Inc., http://www.motorola.com/Consumers/US-EN/About_Motorola/Corporate_Responsibility/Accessibility (last visited April 7, 2011), Nokia, Inc., http://www.nokiaaccessibility.com/ (last visited April 7, 2011); RIM, Inc., BlackBerry Accessibility, http://us.blackberry.com/support/devices/blackberry_accessibility/ (last visited April 7, 2011); National Center for Accessible Media ("NCAM"), Captioning Solutions for Handheld Media and Mobile Devices - Device Comparison Chart, http://ncam.wgbh.org/invent_build/web_multimedia/mobile-devices/devices (last visited April 7, 2011).

[6/] iPhone Accessibility, http://www.apple.com/accessibility/iphone/vision.html (providing the options for persons that have vision, hearing, or physical disabilities) (last visited April 4, 2011).

[7/] *See* Nokia, http://www.nokiaaccessibility.com/vision.html (last visited April 25, 2011).

[8/] RIM, Ltd., BlackBerry Accessibility, http://us.blackberry.com/support/devices/blackberry_accessibility/ (last visited April 17, 2011).

[9/] *See* Tara Annis & Morgan Blubaugh, *An Accessibility Review of the Verizon Haven Cell Phone*, AccessWorld®, http://www.afb.org/afbpress/pub.asp?DocID=aw110704 ("The Haven succeeds in offering a simple, lower-cost accessible solution for anyone looking for a basic cell phone.") (last visited April 17, 2011).

There is also an increasing array of after-market products and solutions from affiliate and independent application providers that offer comprehensive access to people with disabilities. For example, Sprint's Relay Service recently announced a free Sprint Mobile Video Relay Service ("VRS") application for the HTC EVO™ 4G, Samsung Epic™ 4G, and Samsung Galaxy Tab™ that allows users to connect with qualified video interpreters ("VI") to place Mobile VRS calls over a 4G or Wi-Fi network.[10/] Application providers Convo Mobile and Purple recently introduced mobile videophones with VRS technology for products such as the iPhone, iPod Touch, Android, and HTC device.[11/] Apps4Android, Inc. recently released six, carrier-specific, Accessibility Application Installers® ("AAIs") designed to make it easier and more intuitive for wireless carrier retail store personnel, help desk professionals, and wireless subscribers to identify, download, install, sample, and purchase select applications that enhance the accessibility of Android smart devices.[12/] Persons with visual impairments can also take advantage of mainstream apps, such as Vlingo, a voice-to-text and text-to-speech app marketed to the general population and offered as a distracted driving solution.[13/]

Given the increasing availability of accessible wireless solutions, education is a key component to ensuring that people with disabilities are aware of and benefit from these advances. CTIA, in coordination with its member companies, recently re-launched an exciting

---

10 / *See* Sprint Relay, Sprint Mobile VRS, http://www.sprintrelay.com/smvrs/ (last visited April 22, 2011).

11/ *See* DeafTech News, http://www.deaftechnews.com/category/vrs/ (last visited April 5, 2011). (announcing the availability of various Videophone/VRS apps, including: *Convo Mobile for iPhone and iPod Touch, Purple VRS for Android, iPhone and iPod, nTouch Mobile for EVO Android from Sorenson, and Z4 Mobile for HTC Evo 4G, iPhone 4 and iPod Touch from ZVRS*).

12/ Apps4Android, Inc., *Apps4Android Releases Six Android Accessibility Installers®*, http://www.apps4android.org/?p=1034 (announcing the release of AAIs for Android smartphones on AT&T, Sprint, T-Mobile, Verizon Wireless, Vodafone and other carriers' networks) (last visited April 17, 2011).

13/ Vlingo, Inc., http://www.vlingo.com/ (last visited April 17, 2011).

website dedicated to this cause, AccessWireless.Org. CTIA and its member companies received recommendations and insights from a diverse working group to ensure that the website would fit the needs of the accessibility community, including policymakers from the Commission's Disability Rights Office in the Consumer & Governmental Affairs Bureau and representatives from the American Foundation for the Blind, Hearing Loss Association of America ("HLAA"), American Association of People with Disabilities, TDI, Inc., the Autistic Self Advocacy Network, the Alzheimer's Association, and the Wireless Research Engineering and Rehabilitation Center at Georgia Tech.

AccessWireless.Org provides consumers up-to-date information when searching for accessible wireless handsets and services.[14/] The website is easily navigable by providing persons with disabilities, seniors and their families with information about wireless features and suggestions to meet specific accessibility needs. The site's "Find a Phone" capability relies on the Mobile Manufacturer Forum's Global Accessibility Reporting Initiative ("GARI") to help consumers search for, and compare, the accessibility features of a variety of wireless handsets based on the consumers' unique needs.[15/] With the unrelenting pace of innovation in the wireless ecosystem, CTIA believes AccessWireless.Org will always be a resources that is designed to evolve to help people of all abilities find the wireless device or service that is right for them, whether a hearing aid compatible device or a smart phone with accessibility apps.

14/ *See* http://www.AccessWireless.org. *see also* Appendix A.

15/ *See id. See also* "CTIA-The Wireless Association Redesigns AccessWireless.org," CTIA Press Release (Mar. 23, 2011), *available at* http://www.ctia.org/media/press/body.cfm/prid/2064 (noting, "With wireless such a major part of our lives today, the newly designed CTIA website is a valuable resource for people to find accessible devices they can use depending on their needs,' said Brenda Battat, executive director of the HLAA. 'HLAA will certainly recommend CTIA's website to consumers looking for mobile devices that will work with their hearing aids and cochlear implants.").

While CTIA's member companies are thoroughly invested in ensuring that all customers have access to their devices and services, they are equally concerned that the Commission's accessibility requirements do not come at the expense of the innovation and creative effort that characterizes the wireless ecosystem. Congress was well aware of this important balance, and so provided industry significant flexibility to determine which products and services will be made accessible and how to achieve that accessibility.[16/] While using broad language to ensure that the Act was not quickly outdated, Congress directed the Commission to carry out its intent in implementing rules.

The proposed rules in many respects do not appear designed to achieve this result. They do not limit the scope of responsibility for compliance as required by the Act's limited liability provisions; they seek to read out of the Act Congress's directive that not every product and service of a manufacturer or service provider must be made accessible even if achievable; and they seek to expand the reach of section 716 to "multi-purpose devices" despite the clear grandfathering provision under which any device or service subject to section 255 on the date of enactment remains subject to section 255. The final rules must implement Congress's intent with clarity and certainty to manage public expectations, preserve flexibility, and promote competition and innovation for accessible devices and applications. Implementation of the Act will occur most rapidly and smoothly if all participants in, and consumers of, the communications ecosystem understand the respective responsibilities of covered entities under the Act.

The final rules' definition of "advanced communications service" should be clearly limited to those services and equipment that are designed with the primary purpose of advanced

---

16/ *See, e.g.*, House Report at 26 (noting the potential that overburdensome requirements might "slow the pace of technological innovation").

communications. Requiring providers of services and equipment with an incidental advanced communications component to seek waivers is an unworkable solution. The Commission's interpretation of other defined terms must be structured to provide certainty about what is covered, flexibility in how to achieve accessibility, and with the goal always in mind of promoting the development and deployment of new communications technologies rather than overburdening them with regulation.

Restrained recordkeeping obligations and tailored enforcement requirements that observe fundamental notions of due process are also critical to creating an environment in which providers can and are motivated to devote their resources to the development of innovative services and devices for all their subscribers.

I. THE SCOPE OF PROPOSED COMPLIANCE RESPONSIBILITY MUST ADHERE TO THE FRAMEWORK ESTABLISHED UNDER THE ACT

The rules the Commission adopts must promote the careful balance Congress established between increasing the accessibility of products and services for people with disabilities and avoiding burdening industry with overly detailed or restrictive regulation that hampers innovation and investment. In three critical respects, the proposed rules fail to adhere to this deliberate structure.

- *First*, in many respects, both directly and indirectly, the proposed rules do not delineate the scope of compliance in a manner that ensures covered entities are not held responsible for the compliance or noncompliance of third parties.
- *Second*, while purporting to acknowledge that Congress directed that not every product or service must be made accessible for every disability – separate and apart from the consideration of whether such accessibility is achievable – the Commission in the proposed rules seeks to read that language out of the statute and establish a structure

requiring that accessibility in every product or service, unless such accessibility is not achievable.

- *Third,* despite clear language applying the new requirements only to products and services not already covered by section 255 at the time of enactment, the proposed rules suggest there is an open issue as to whether products or services currently subject to section 255 might nonetheless be subject to the new requirements if they offer a capability covered by the new law.

A. The Proposed Rules Do Not Sufficiently Recognize That Entities May Not Be Held Responsible For The Compliance Of Third Party Products And Services.

The Act clearly limits covered entities' responsibility for compliance to those advanced communications products or services that they offer, not those of a third party, even if those third party services are accessed through the facilities, equipment or service of a covered entity.[17/] Although the Commission purports to recognize the limitation on liability,[18/] it nevertheless solicits comment in myriad situations regarding whether or not a covered entity can be held liable to ensure compliance of a third party's product or service. Indeed, while the NPRM observes that "Section 716 reflects the reality that ACS is delivered in a complex Internet ecosystem" and that "accessibility obligations must be shared by all entities in that ecosystem,"[19/] the proposed rules seemingly make no effort to reflect that reality in their allocation of responsibility.

17/ Act § 2(a); *see* House Report at 22 (the Act provides "liability protection where an entity is acting as a passive conduit of communications made available through the provision of advanced communications services by a third party or where an entity is providing an information location tool through which an end user obtains access to services and information").

18/ *NPRM* ¶ 21, n.62.

19/ *NPRM* ¶ 14 (citing AT&T's comments).

In each such situation, the final rules should be clearly drafted to reflect the Act's limitations. For example:

- The NPRM seeks comment on whether manufacturers should be held responsible for "the accessibility of software that is installed or downloaded by the user" or future upgrades to the software.[20/] The clear answer under the Act is no. A manufacturer cannot be held responsible for software that it does not control and that it has no knowledge the user may select and download.[21/]
- The NPRM asks whether there are any circumstances in which service providers can be held responsible for third party services and applications.[22/] Other than the limited exception described in the Act, no such circumstances exist; any contrary result is banned by the plain language of the Act.[23/]
- The NPRM seeks comment on whether there is a difference between "providing" an advanced communications service and providing a network over which advanced communications services are accessed, and whether it must account for any distinction in defining covered providers.[24/] The difference between these two terms goes to the very heart of the limited liability provision: the former is a covered entity

---

20/ *NPRM* ¶ 21.

21/ The Act's limitation on liability excludes third party software, hardware that a covered entity relies on to fulfill the requirements of the Act. Act § 2(b).

22/ *NPRM* ¶ 27.

23/ *Lamie v. United States Trustee*, 540 U.S. 526, 538 (2004); *Alabama Power Co. v. Costle*, 636 F.2d 323, 365 (D.C. Cir. 1979) (an agency must interpret a statute according to its plain language, and may not add language that Congress has not included).

24/ *Id.*

and the latter is explicitly exempt from the Act. Defining these two activities to be the same would nullify the Act's limited liability provision in its entirety.[25/]

Moreover, the NPRM describes the five layers of components that go into the provision of a communication service or network,[26/] explains that for accessibility features and capabilities to work, all of the component layers may have to support them,[27/] and proposes that the manufacturer of the end user equipment be responsible for all the component layers of their products.[28/] This type of requirement may have the effect of limiting innovative efforts by end user equipment manufacturers if they cannot in fact control the component layers.

While this may make sense for certain functions and features – such as those integral to the use of the equipment for advanced communications – it may not be sensible in other situations. For example, a manufacturer may choose to offer subscribers the ability to download or add optional third party software or applications at the time of purchase as a convenience to the subscriber. Such an arrangement should not cause the manufacturer to become automatically responsible for the accessibility of those add-ons, nor should the manufacturer be held responsible for ensuring that the accessible features of the device are interoperable with those add-ons.

Clear limitations on liability will ensure that all participants understand their role in making a product or service accessible and are comfortable that they will not be held responsible for failures that they have no role in preventing. Creating this stable and predictable regulatory

---

25/ *United Savings Ass'n of Texas v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365 (1988) (a statutory provision cannot be interpreted in a way that is inconsistent with the policy of another provision).

26/ *NPRM* ¶ 15.

27/ *Id.* ¶ 17.

28/ *Id.* ¶ 24.

environment will, in turn, inspire greater investment and innovation in products and services, including features that enhance their accessibility.[29/] The Commission should revise the proposed rules to clearly reflect the limited liability provision enacted by Congress.

B. The Proposed Rules, By Presuming That All Products And Services May Be Deemed Advanced Communications Services, Do Not Sufficiently Adhere To The Act's Directive That Not Every Product And Service Must Be Accessible For Every Disability.

Under section 716(j), Congress directed that the Act not be interpreted to require covered entities to make every function and feature of every device or service accessible to every disability.[30/] Since the Act already limits the scope of accessibility obligations to actions that are "achievable", it is axiomatic that this provision must be read in a way that gives it separate relevance. Therefore, section 716(j) cannot be interpreted in a way that renders it superfluous.[31/]

The NPRM acknowledges this provision and appears to properly reject an interpretation of the Act that would require every function of a product to be made accessible if it can be done achievably,[32/] but the proposed rules are nonetheless drafted in a way that fail to provide for this flexibility, instead imposing a flat obligation. There is no provision allowing providers and manufacturers of covered services and products the flexibility to determine which of their products and services they will make accessible, assuming a variety of features, benefits and

---

29/ *See, e.g., Amendment of Part 27 of the Commission's Rules to Govern the Operation of Wireless Communications Services in the 2.3 GHz Band*, Report and Order and Second Report and Order, 25 FCC Rcd 11710, ¶ 198 (2010) (stating that the "new [mobile or point-to-multipoint services] requirements also will afford WCS licensees bright-line certainty regarding their performance obligations"); *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets; Petition of American National Standards Institute Accredited Standards Committee C63 (EMC) ANSI ASC C63R*, First Report and Order, 23 FCC Rcd 3406, ¶ 24 (2008) (noting the "need for certainty, and the desirability of providing appropriate and timely notification to manufacturers and service providers as regards their…obligations.").

30/ 47 U.S.C. § 617(j).

31/ *See, e.g., South Carolina v. Cawtawba Indian Tribe, Inc.*, 476 U.S. 120, 123-24 (1989).

32/ *NPRM* ¶ 75.

price points are included in the range of accessible products. To the contrary, the Commission's proposed rules appear to suggest that products and services are permissibly not accessible only when making them accessible is not achievable.[33/] The rules must be revised to give clear and independent effect to section 716(j) and provide the industry the flexibility that Congress intended.[34/]

C. The Proposed Rules Do Not Sufficiently Reflect Congress's Intention That Section 716 Not Apply To Equipment Or Services That Were Subject To Section 255 Before Enactment.

Section 716(f) of the Act dictates that services or equipment subject to section 255 before enactment, including interconnected VoIP, should remain subject to section 255.[35/] The Commission recognizes that this language "clearly provides" that interconnected VoIP equipment and service remains subject to section 255, but nonetheless asks more generally whether multi-purpose devices (*i.e.*, those that are used to provide both telecommunications and advanced communications services) should be subject to both section 255 and 716.[36/] Such an interpretation would contradict section 716(f) of the Act and should be rejected.

To the extent a service or device was subject to section 255 before enactment, section 255 will continue to govern its accessibility requirements, regardless of how it is used. Any contrary result would not only violate the plain language of the statute, but would establish a confusing regulatory scheme in which the same device could be held subject to different regulatory obligations depending on its different use by different subscribers.

33/ *See, e.g.*, *NPRM,* Appendix B, Proposed Rules §§ 8.5(a), 8.5(b).

34/ House Report at 24.

35/ 47 U.S.C. § 617(f) (Section 716 "shall not apply to any equipment or services, including interconnected VoIP service, that are subject to the requirements of section 255 on the day before enactment." Rather, those services "remain subject to the requirements of section 255.").

36/ *NPRM* ¶ 30.

As CTIA stressed in its earlier comments,[37/] however, it is critical that manufacturers and providers are aware of their regulatory obligations well in advance of their obligation, so that they can appropriately incorporate accessibility planning into the product or service's development. Allowing new uses of a product, which occur outside of the provider or manufacturer's control and potentially even without its knowledge, to trigger a new regime of regulatory obligations would deprive manufacturers and providers of this needed planning opportunity. It also could potentially have the unwanted effect of incenting manufacturers and providers not to add new features or capabilities to existing products and services for fear of triggering additional regulation. Creating rules that clearly implement section 716(f) will provide the certainty those manufacturers need and that Congress intended.[38/]

II. THE SCOPE OF PROPOSED DEFINITIONS IS OVERBROAD AND SHOULD BE LIMITED TO THE PRIMARY PURPOSE OF SPECIFIC PRODUCTS OR SERVICES

Congress was well aware that its definition of "advanced communication services" was broad and would need to be tailored by the Commission, and specifically suggested that devices that are capable of accessing advanced communications but are "designed primarily for purposes other than accessing advanced communications" would be likely candidates for exclusion from

---

37/ *See, e.g.*, Comments of CTIA-The Wireless Association®, CG Docket No. 10-213 (filed Nov. 22, 2010) at 14 ("CTIA Comments") ("Establishing easily comprehensible rules that clearly delineate the extent of each participant's responsibilities to make their products or services accessible, particularly combined with the strong liability protections discussed above, will allow each participant to appropriately plan and develop their products and services accordingly, minimizing later disputes.").

38/ *Fabi Constr. Co., Inc. and Pro Mgmt Group v. Secretary of Labor*, 508 F.3d 1077, 1088 (D.C. Cir. 2007) (companies must be able to "identify, with 'ascertainable certainty,' the standards with which the [FCC] expects parties to conform."), citing *General Elec. Co. v. EPA*, 53 F.3d 1324, 1328-1333 (D.C. Cir. 1995); *Trinity Broad. of Fla., Inc. v. FCC*, 211 F.3d 618, 628 (D.C. Cir. 2000) (reiterating that parties must be able to interpret rules with "ascertainable certainty"); *FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977) ("there is the need for a clear and definitive interpretation of all agency rules so that the parties upon whom the rules will have an impact will have adequate and proper notice concerning the agency's intentions").

accessibility requirements.[39/] Rather than incorporate this limitation into the rules, the Commission's proposal to require companies to seek waivers on a case-by-case basis establishes an unworkable procedure that will delay the introduction of products and services into the market and impose unnecessary costs and uncertainty.

A. "Advanced Communications Services" Should Exclude Services And Equipment That Are Not Designed With Advanced Communications As Their Primary Purpose.

Congress's primary focus in enacting the Act was to ensure that persons with disabilities have equal access to advanced communications products and services. It created a broad definition of "advanced communications services" to ensure that the definition would capture products and services as they evolve, but left it to the Commission to narrow the scope of products and services covered by the Act, noting that in today's society, many products and services have incidental communications capabilities and might be properly excluded from coverage.[40/] Many commenters submitted examples of such products and services, agreeing with CTIA that applying a "primary design purpose" test would ensure that services that fall incidentally within one of the definitions, but are not primarily designed to be used for advanced communications services, should not be subject to the accessibility requirements.[41/]

The NPRM recognizes these limitations, but proposes that rather than exempting such products and services from the definition of what is covered, the Commission will consider

---

39/ House Report at 26 (emphasis added).

40/ *Id.*

41/ *See, e.g.*, Comments of the Entertainment Software Association, CG Docket No. 10-23 (filed Nov. 22, 2010) at 3-4 ("ESA Comments"); Comments of Microsoft Corp., CG Docket No. 10-23 (filed Nov. 22, 2010) at 3-5 ("Microsoft Comments"); Comments of the Telecommunications Industry Association, CG Docket No. 10-23 (filed Nov. 22, 2010) at 4-5 ("TIA Comments").

exempting such products and services through a waiver process.[42/] Moreover, the NPRM at times suggests that the Commission's inquiry in evaluating such a waiver request will focus on how a specific product is used rather than the purpose for which it was designed.[43/] Neither of these approaches is workable.

1. Determining accessibility requirements by looking at how a product or service is used rather than its designed purpose is unworkable.

In determining the limits of the Act's definitions of "advanced communications services", the Commission's determination must focus on a product or service's primary design purpose, not how it is used in the marketplace. This approach, where a manufacturer has knowledge of the regulatory environment before it introduces a product to the market, is critical to both innovation and investment. This approach should be the case whether the Commission exempts certain products and services from the Act's coverage by excluding them from the definition of "advanced communication services," or instead uses a waiver process to implement exclusions (a process that, as CTIA describes below, is the wrong approach).

As CTIA explained in its Public Notice comments,[44/] it is extremely important that service providers and manufacturers have clear notice well in advance of introducing a product or service into the market of whether or not it will be subject to accessibility requirements.

42/ *NPRM* ¶ 32 (tentatively rejecting proposal to exclude from the definition of "non-interconnected VoIP service" offerings with a purely incidental VoIP component and instead address the issue through the waiver process) and ¶ 43 (tentatively rejecting proposal to exclude from the definition of "interoperable video conferencing service" products that offer a video connection that is incidental to the principal purpose and nature of the end user offering and instead address the issue through the waiver process).

43/ *Compare NPRM* ¶ 53 ("we propose to focus our inquiry on determining whether the offering is designed primarily for purposes other than using ACS") with *NPRM* ¶¶ 54-55 (suggesting that it is relevant how an end user views a device's primary purpose and that how a device is used is relevant to a waiver determination).

44/ *See* CTIA Comments at 14; *Advanced Communications Provisions of the Twenty-First Century Communications and Video Accessibility Act of 2010*, CG Docket No. 10-213, Public Notice, 25 FCC Rcd 14589 (2010) ("Public Notice").

Covered entities need certainty and predictability about which products and services are covered. As the Commission previously noted, accessibility considerations – and their associated needs and costs – must be evaluated and incorporated early in the design process, and certainly well before a product or service launch.[45/] Focusing on post-marketed uses (*e.g.*, "how consumers actually use the communications component of a multi-purpose device or service")[46/] to determine coverage will deprive industry of this needed certainty.

In some limited circumstances, the NPRM recognizes that certain products or services should not be covered by the Act, even if they fall literally within the definitions of covered services.[47/] The Commission should do the same for any product or service that is not designed primarily for the purpose of "advanced communications services."

2. Requiring covered entities to seek a waiver for each product or service whose primary purpose is not advanced communications is unworkable.

Requiring covered entities to seek a waiver for each product or service whose primary purpose is not "advanced communications services" would create damaging uncertainty about whether or not a product or service is covered by the Act, potentially delaying the introduction of innovative offerings to the market.

45/ *Amendment of the Commission's Rules Governing Hearing Aid-Compatible Mobile Handsets*, Policy Statement and Second Report and Order and Further Notice of Proposed Rulemaking, 25 FCC Rcd 11167, ¶ 18 (2010) (stating "given that consideration of accessibility from the outset is more efficient than identifying and applying solutions retroactively, [the Commission] intend[s] for developers of new technologies to consider and plan for hearing aid compatibility at the earliest stages of the product design process.").

46/ *NPRM* ¶ 55.

47/ *See, e.g.*, *NPRM* ¶ 33 (proposing to exclude from the definition of "electronic messaging service" blog posts, online publishing and other services that are not "more traditional, two-way interactive services").

Both the public and covered entities need certainty about whether a product or service is covered when that product or service is introduced to the market.[48/] Because accessibility must be considered early in the design process or business plan to be included, in order to be meaningful, a waiver would have to be granted during the design phase. Such an approach raises numerous practical problems.

Covered entities would need to seek a waiver well before the final details of a device or service were known, and the predictable ensuing dispute over accessibility could result in a lengthy proceeding. Indeed, the NPRM's lengthy discussion and recognition of opposing opinions on the "primary purpose" of such devices[49/] confirms CTIA's concern that any waiver process would likely last months if not years as parties debate the primary purpose of a specific device. There can be no realistic expectation that the Commission will issue a decision in the time frame needed for business, particularly given the NPRM's rejection of suggestions that the Commission agree to act within a designated time frame or consider the request granted.[50/] Moreover, finalizing the product or service and launching it would have to await a ruling on accessibility, since the NPRM concludes that companies may not introduce new products and services pending waiver approval without risk of penalty if the Commission finds that the device or service must comply with its accessibility requirements.[51/]

48/ *See supra*, notes 41-42. *See also* Reply Comments of CTIA-The Wireless Association®, CG Docket No. 10-213 (filed Dec.7, 2010) at 3 ("Because today's solutions may be tomorrow's outdated technology, the Commission should ensure that the rules adopted under the Accessibility Act are general enough to provide certainty for consumers and industry and flexible enough to permit innovative and novel approaches to accessible wireless solutions.") ("CTIA Reply Comments").

49/ *NPRM* ¶¶ 55-56.

50/ *Id.* ¶ 57.

51/ *Id.*

In today's competitive market, in which products and services have to be designed and launched very quickly to respond to competitors' offerings, this entire scheme is utterly unworkable. Indeed, under the proposed approach, the product or service could be mooted before a decision is even reached. The proposed waiver procedure thus works directly against Congress's intent that the accessibility requirements not compromise industry innovation and progress.

The far better approach – and the only approach that comports with Congressional intent – is for the rules to state clearly in advance that products and services that are designed primarily for reasons other than "advanced communications services" but which have an incidental advanced communications functionality are excluded from the definition.[52/] Holding out the possibility of seeking a waiver cannot alleviate the substantive and procedural flaws of the rules. The waiver process is meant to address unusual exceptions to a rule, not an issue like this one, which has been identified in advance that affects numerous entities. Courts have held repeatedly that instituting a waiver process cannot address basic defects in the underlying rule.[53/] The final rules should adopt CTIA's proposed "primary purpose test" with respect to the definition of advanced communications services.

52/ This approach would also comport with the courts' long-standing position that an agency must provide clear notice of its requirements and rules. *See Maxcell Telecom Plus, Inc. v. FCC*, 815 F.2d 1551, 1558 (D.C. Cir. 1987), *aff'd La Star Cellular Tele. Co. v. FCC*, 899 F.2d 1233 (1990) (noting, in the licensing context, that rather than waiting for enforcement to review an unclear standard, "[i]t is beyond dispute that an applicant should not be placed in the position of going forward with an application without knowledge of requirements established by the Commission, and elementary fairness requires clarity of standards sufficient to apprise an applicant of what is expected").

53/ *ALLTEL Corp. v. FCC*, 838 F.2d 551, 561 (D.C. Cir. 1988) ("The FCC cannot save an [arbitrary] rule by tacking on a waiver procedure.") (internal quotation marks omitted); *see also Ass'n of Oil Pipe Lines v. FERC*, 281 F.3d 239, 244 (D.C. Cir. 2002) ("[B]y definition, a 'safety valve' should only address aberrant cases, however broadly this class may be defined. . . . A safety valve cannot rescue FERC's indexing methodology from systemic errors, for then the exception would swallow the rule.").

B. The Definition Of "Electronic Messaging Service" ("EMS") Should Not Include Services And Applications That Merely Provide Access To An EMS.

CTIA agrees that Congress intended the definition of EMS to narrowly apply to "traditional services" such as "text messaging, instant messaging, and electronic mail."[54/] Accordingly, the Commission should retain the proposed definition of EMS as "a service that provides real-time or near real-time non voice messages in text form between individuals over communications networks."[55/] This definition would not include communications such as software updates or machine-to-machine communications.[56/]

In recognizing this limitation, the Commission should reject any suggestion that expanding the definition to include services and applications that merely provide access to EMS (*e.g.*, a broadband service) are covered by this definition. Such an approach would contradict the plain language of the Act, as well as the provision of the Act specifically exempting such services from inclusion.[57/]

C. The Definition Of Interoperable Video Conferencing Service ("IVCS") Should Comport With The Plain Language Meaning Of The Term.

The NPRM proposes that the definition of IVCS cover "a range of services and end user equipment," including a broad list of any end user equipment with an interactive video capability and potentially going so far as to include the non-real time functions of such equipment or service.[58/]

The Commission's proposed definition and explication as applied to both IVCS services and devices is impermissibly broad and exceeds the bounds of the statute. *First*, the scope of

---

54/ *NPRM* ¶ 33; *see also* Senate Report at 9; House Report at 23.

55/ *NPRM*, Appendix B, Proposed Rule § 8.4(i).

56/ *NPRM* ¶ 34.

57/ Act § 2.

58/ *NPRM* ¶¶ 36, 40-42.

IVCS should not include a broad range of equipment such as personal computers and tablets as well as smart phones and others.[59/] These devices are not primarily designed for two-way video conferencing and should not be considered IVCS end user equipment. As noted in the comments submitted in this docket, IVCS is a nascent service that application designers and manufacturers are still developing.[60/] Rather than requiring *virtually all* personal devices to provide accessibility features for an evolving service, the Commission should instead implement a tailored approach and apply any such requirements only to equipment specifically designed for IVCS (*i.e.*, two-way video conferencing).[61/]

Second, the definition of IVCS cannot be impermissibly expanded to include any "type of communication conveyed by the video conferencing service" just because it has the capability of "real-time communications."[62/] Thus, the FCC cannot assert its ancillary jurisdiction to cover services, such as e-mail or video mail, where Congress clearly limited the range of what was to be covered as an IVCS.[63/] As courts have recognized, the FCC cannot impermissibly broaden a statutory definition to encompass services not contemplated by the Act.[64/]

59/ *Id.* ¶ 35.

60/ Comments of Voice on the Net Coalition, CG Docket No. 10-23 (filed Nov. 22, 2010) at 11 ("VON Coalition Comments").

61/ Notably, the Video Accessibility Act explicitly prohibits the Commission from adopting rules that mandate the use or incorporation of proprietary technology. Act § 3.

62/ *NPRM* ¶ 42.

63/ *See, e.g.*, *Silvers v. Sony Pictures Ent., Inc.*, 402 F.3d 881, 885 (9th Cir. 2005) (noting the presumption that "when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions"); *see also Arc Ecology v. United States Dep't of the Air Force*, 411 F.3d 1092, 1100 (9th Cir. 2005) ("[O]missions are the equivalent of exclusions when a statute affirmatively designates certain persons, things, or manners of operation."); SUTHERLAND STAT. CONST. § 47.23 ("[W]here a form of conduct, the manner of its performance and operation, and the persons and things to which it refers are designated, there is an inference that all omissions should be understood as exclusions.").

64/ *See Teva Pharm. Indus. v. Crawford*, 410 F.3d 51, 55 (D.C. Cir. 2005) (agency could not expand an obligation for purposes not enunciated in the statute nor could it use its general rulemaking authority "to expand the specific but more limited grant of exclusivity" provided in the statute); *American*

The NPRM further suggests that because the term "interoperable" was added to the Act late in the process and the definition did not change, the word should be read out of the statute as meaningless. It is well-established, however, that each word of a statutory provision must be given effect and no words may be considered surplusage.[65/] By the statute's plain language, only "interoperable" video conferencing services fall within the definition of "advanced communications service."

Nor may the descriptive use of the term "interoperable" be somehow converted into a back door requirement that all video conferencing services become "interoperable" under the Act. Where Congress intended to impose obligations under the Act, it did so, clearly and unambiguously, not through subtle changes to definitions.

That Congress could not have intended to impose an interoperability requirement on video conferencing services is confirmed by their extreme nascency in the market. True interoperable video conferencing services are extremely rare, to the extent they even exist.[66/] Imposing an interoperability requirement would disrupt the market, and would have the consumer-unfriendly result of forcing the adoption by all of the few technologies that are available today. Locking providers into currently available solutions will effectively stifle new technologies from evolving and so preclude the development of new IVC services that might

---

Petroleum Inst. v. EPA, 52 F.3d 1113, 1119 (D.C. Cir. 1995) (an agency "cannot rely on its general authority to make rules necessary to carry out its functions when a specific statutory directive defines the relevant functions of [the agency] in a particular area").

65/ *See, e.g.*, *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004) ("[W]e must give effect to every word a statute wherever possible."); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'") (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)); *id.* at 174 ("We are thus 'reluctant to treat statutory terms as surplusage' in any setting") (quoting *Babbitt v. Sweet Home Chapter, Communities for Great One*, 515 U.S. 687, 698 (1995)); *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (noting "the cardinal principal of statutory construction that courts must give effect, if possible, to every clause and word of a statute").

66/ CTIA Reply Comments at 6; VON Coalition Comments at 11.

substantially benefit consumers. Prematurely locking providers into particular technologies or applications could also prevent them from responding to customers' changing needs, technological advances, or marketplace realities.[67/] The final rules should make clear that only those video conferencing services that are interoperable must be accessible under the Act.

D. The Exception for Customized Equipment Or Service Cannot Be So Narrow As To Nullify The Exception.

Section 716(i) explicitly exempts "customized equipment and services that are not offered directly to the public" from the requirements of the Act.[68/] Congress explained that this provision is meant to distinguish equipment or service that has been "customized to the unique specifications requested by an enterprise customer," from "equipment and services designed for and used by members of the general public."[69/]

Despite the clear distinction drawn by Congress, the Commission seeks to limit use of this exception, asking whether it should nonetheless subject customized equipment or services to the rules when it believes that customizations are "minor" or when the customizations are for a customer that allows the public to use the service (*e.g.*, a school or library). The Act, however, provides for no such interpretation. The Commission must implement the exception as directed by the plain language of Act.[70/]

67/ CTIA Reply Comments at 7; Comments of Convo Communications, LLC, CG Docket No. 10-213 (filed Nov. 22, 2010) at 6 ("Convo Comments").

68/ 47 U.S.C. § 617(i).

69/ House Report at 26.

70/ *See supra*, note 21.

E. The FCC Should Call On Industry To Study The Mobile Internet Browser Issues.

The NPRM seeks input on how best to implement the provisions of section 718 regarding Internet browsers built into telephones used with public mobile services.[71/] CTIA supports Verizon's suggestion that the Commission should take advantage of section 718's three-year implementation timeline and allow an industry group to formulate an appropriate, cohesive, implementation plan. The Commission should call on an industry group to lead this effort and ensure that "affected manufacturers and service providers" have "an opportunity to provide input" into the development of compliance mechanisms.[72/]

III. THE PROPOSED RULES MUST ADHERE TO CONGRESS'S INTENDED DEFINITION OF BOTH "ACHIEVABLE" AND "INDUSTRY FLEXIBILITY"

A. The Definition Of "Achievable" Should Be Specific So That Companies Understand The Nature Of Their Obligations.

The NPRM asks, in considering whether accessibility is "achievable," if the FCC should consider only the factors specified by Congress, or whether the Commission has discretion to consider other factors not listed in the statute.[73/] CTIA agrees with the FCC's view that it "should *only* consider the factors enumerated in the statute in making [its] achievability determinations."[74/] Indeed, the FCC has no authority to pursue a different interpretation.[75/] However, the FCC's further proposal that it should "construe the factors broadly and weigh any

---

71/ *NPRM* ¶¶ 143-44.

72/ *Id.* ¶ 144.

73/ *Id.* ¶ 70.

74/ *Id.*

75/ *See, e.g., Natural Res. Def. Council, Inc. v. Reilly*, 976 F.2d 36, 41 (D.C. Cir. 1992) (finding that the agency could not use its general rulemaking authority as justification for adding new factors to a list of statutorily specified ones and stating "we have not allowed the general grant of [agency] rulemaking power . . . to trump the specific provisions of the Act").

relevant considerations in determining their meaning"[76/] appears specifically designed to subvert this limitation. Any such approach would be impermissible.[77/]

Observing these limits on authority ensures that companies are not in the dark about what standards the FCC will apply to their accessibility determinations. Because companies need clear guidance about the standard to which they will be held, adding new considerations or factors not enunciated in the rules would not give companies this required certainty.[78/]

The Commission should also reject the proposal that accessibility be deemed "not achievable" only if the "totality of the steps" the company would need to take is "extraordinary."[79/] This proposal ignores the "reasonableness" standard that Congress designated and would be contrary to the statute's intent, as well as Congress's specific direction that the Commission weigh each of the specified factors equally.[80/]

Any suggestion that the Commission has authority to designate a "set of important or easy features" that must be deployed on every product is likewise precluded by the statute.[81/] Not only section 716(j), but the achievability standard itself, precludes the FCC from

---

76/ *NPRM* ¶ 70.

77/ *See, e.g., Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) (administrative interpretation of a statute contrary to plain language is not entitled to deference); *Securities Industry Ass'n v. Bd of Governors of Fed. Reserve System*, 468 U.S. 137, 143 (1984) ("A reviewing court 'must reject administrative constructions of [a] statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.'") (quoting *FEC v. DSCC*, 454 U.S. 27, 32 (1981)).

78/ *See, e.g., FTC v. Atlantic Richfield Co.*, 567 F.2d 96, 103 (D.C. Cir. 1977) ("there is the need for a clear and definitive interpretation of all agency rules so that the parties upon whom the rules will have an impact will have adequate and proper notice concerning the agency's intentions").

79/ *NPRM* ¶ 71 and n.209 (describing ACB's proposal as establishing a standard that would require companies to show that accessibility is "'not achievable' if the 'totality of the steps it needs to take are extraordinary, and . . . the cost for making this one product accessible, when compared to the organization's entire budge, is extraordinary.'").

80/ House Report at 25; *see NPRM* ¶ 70.

81/ *NPRM* ¶ 76.

determining that some accessible features are so "important or easy" that they must be included regardless of whether they are achievable or whether they are included in a product or service that the covered entity has determined to make accessible. Such an approach would inevitably lead to a slippery slope in which increasing numbers of features are sought to be on the list of those required for every product or service and numerous disputes arise over which features or disabilities are more "important" than others. Moreover, any such list of features would quickly become outdated as technology progresses and revolutionary solutions emerge. The "nib" on the 5 key that the FCC references,[82/] for example, is quickly becoming outdated as wireless devices move to touch screens. The rules could not possibly be drafted to anticipate, nor keep up with, such advances.

In construing the "achievability" standard, the Commission should interpret the factors with the goal of promoting the development and deployment of new advanced communications services. Allowing accessibility to be a normal part of the design process and an everyday consideration in business plans, rather than a regulatory set of hurdles to be overcome, is most likely to result in an enhanced array of innovative features and options that enhance accessibility. Moreover, the FCC commonly takes care to ensure that burgeoning technologies are not overburdened with regulatory requirements. There is a longstanding recognition that new services and technologies may need a period of time to come into compliance with existing regulation so that various regulatory goals can be balanced with the consumer interest in the creation and launch of new products and services.[83/]

82/ *Id.* ¶ 76 and n.222.

83/ *See, e.g.*, 47 C.F.R. § 79.1(d)(9) (giving new networks four years from launch to come into compliance with captioning obligations); *Implementation of Sections 255 and 251(a)(2) of The Communications Act of 1934, as Enacted by The Telecommunications Act of 1996: Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Order, 24 FCC Rcd 8665 (2009) (granting VoIP networks an extended waiver

B. The Rules Cannot Interpret Congress's Direction to Provide "Industry Flexibility" In A Manner That Nullifies the Purpose of The Provision.

CTIA agrees with the FCC's determination that that the Act's "statutory language and legislative history preclude [it] from preferring built-in accessibility solutions."[84/] In several respects, however, the proposed rules nonetheless appear designed to evade this statutory limitation by placing limitations on when "third party solutions" may be used. Suggestions that the Commission need take "action" to ensure that third party accessibility solutions "meet the needs of consumers in a manner comparable to solutions that are built into the equipment"[85/] suggests the intent to impose differing regulatory obligations on third party solutions beyond the one consideration – cost – that the FCC is empowered to consider. Any such attempt would directly contradict Congress's direction that the choice of how to implement accessibility "rests solely with the provider or manufacturer."[86/]

Moreover, there is no reason that such third party solutions may not be made available after-market, rather than at the point of purchase. In fact, such a requirement threatens to harm the continued development of innovative accessibility solutions. Frequently, after-market solutions allow customers with disabilities to tailor a device to their unique needs. Moreover, third party vendors such as Convo Mobile and Apps4Android, Inc. are constantly developing innovative applications that provide greater accessibility to wireless devices and services for persons with various abilities and disabilities.[87/] A vigorous market for accessibility software

---

of the telecommunications relay service rule).

84/ *NPRM* ¶ 77.

85/ *Id.* ¶ 78.

86/ House Report at 24.

87/ *See* Convo Mobile, http://convorelay.com/mobile.html (providing easy-to-access applications for deaf-to-deaf calling, mobile calling, and 911 access); *see also* Apps4Android, Inc., http://www.apps4android.org (last visited April 17, 2011).

and applications is best promoted when consumers and service providers can constantly update the manner in which their device is accessible, rather than being locked into whatever options are available at the time the device is purchased. If, for example, a new type of software or new application becomes available that a provider or manufacturer believes would better support or enhance the accessibility of older devices, consumers should benefit from that innovation, rather than being tied to an outdated approach. Covered entities should be able to change their means of compliance, as long as the third party solution remains a nominal cost.

With regard to the definition of what constitutes a "nominal cost" for third party accessibility solutions, CTIA supports the proposed definition as drafted,[88/] provided that the Commission considers the following when evaluating the cost of a third party solution.

- *First*, the Commission should view cost, not as a percentage of an initial purchase price, but rather examined in relation to the overall value and life of both the device and the underlying communications service.
- *Second*, the Commission should consider that Congress intended that nothing in the Act should be construed to require covered entities to subsidize the cost of third party solutions for consumers.[89]

By considering these factors, the Commission can ensure that industry and consumers may look to third party solutions as viable options to enhance the accessibility of advanced communications services and equipment.

88/ *NPRM* ¶ 78; *id.*, Appendix B, Proposed Rule § 8.4(p) ("The term *nominal cost* in regard to accessibility and usability solutions shall mean small enough so as to generally not be a factor in the consumer's decision to acquire a product or service that the consumer otherwise desires.").

89 House Report at 24

C. A Network Provider's Duty Not To Impede Accessibility Should Apply Only To Deliberate Actions.

With regard to a network operator's duty not to impede accessibility services and technologies,[90/] such obligations should only apply to affirmative, deliberate, knowing actions, not passive actions. As CTIA observed in its Public Notice comments, there is no way of knowing when and how accessibility has been incorporated until the incorporation is done in a standard, recognizable way.[91/] As such, the only reasonable means of ensuring compliance is to identify industry-recognized accessibility standards for applications and content and require their use, so that the scope of a network operator's obligation not to block accessibility is clearly defined. Review of such standards will also provide insight about how providers can ensure that they do not impede accessibility while also managing network traffic, including advanced communications services. Because industry stakeholders face these challenges on a daily basis, the Commission should call on industry to develop a working group to review current standards and recommend new accessibility standards for advanced communications services. In order to avoid potential confusion and uncertainty among network providers, the Commission should not require compliance with the provision until the industry working group formulates and offers such standards for the industry.[92/]

In developing such standards, an industry working group should ensure that any compliance standard considers not only the impact to network management concerns, but also digital rights management limitations, network security, and consumer privacy requirements. These functions are critically important not only to the accessibility community but to all users

---

90/ 47 U.S.C. §§ 617(d), (e)(1)(B).

91/ *See* CTIA Comments at 14-15.

92/ CTIA Comments at 15.

accessing the network. Thus, these concerns must all be addressed in formulating a policy that may impact the way a provider manages traffic flow.

IV. THE IMPLEMENTATION GUIDELINES AND PROPOSED RECORDKEEPING OBLIGATIONS SHOULD BE CONSISTENT WITH THE ACT

A. The Prospective Guidelines Should Not Mirror Existing Guidelines.

The NPRM seeks comment on whether the prospective guidelines it is required to adopt should incorporate or mirror the approach of other existing guidelines, such as the World Wide Web Consortium's Web Content Accessibility Guidelines or the Access Board's Draft Guidelines on section 508.[93/] While the Commission should examine and consider the usefulness of other existing guidelines in its efforts to provide cohesive guidance on accessibility requirements, it should not solely rely on those sources, which were designed for a different purpose and should not be the basis of the Commission's prospective guidelines for section 716. The Access Board Guidelines also are not sufficiently clear as to provide useful guidance, do not offer manufacturers certainty as to which requirements apply for which regulatory purpose, do not offer manufacturers and providers sufficient technological flexibility to enable a seamless transition from traditional devices to IP-based technologies, and in some cases, impose backward-compatibility obligations that deter innovation.[94/] Instead the Commission should call on the industry to create a working group with the goal of developing guidelines that would meaningfully assist the industry in implementing accessibility requirements for advanced communications services.

93/ *NPRM* ¶ 115.

94/ CTIA Comments at 12.

B. The Act's "Recordkeeping" Obligations Should Not Be Viewed As "Reporting" Obligations.

The NPRM's discussion of how the Commission should implement the recordkeeping requirements of the Act suggests an inclination of the Commission to effectively expand such requirements into "reporting" obligations.[95/] While such reporting obligations are not specifically proposed and would be unauthorized,[96/] the Commission should take care in its final rules to avoid any such implication. CTIA agrees with the FCC that it should not "mandate any one form in which records must be kept."[97/] By keeping the means of compliance flexible, covered entities are permitted to incorporate the section 717 recordkeeping requirements into their existing recordkeeping methodologies and procedures in an efficient and seamless manner

V. THE COMMISSION'S PROPOSED ENFORCEMENT REGIME SHOULD ENCOURAGE THE EARLY RESOLUTION OF COMPLAINTS, MEET BASIC REQUIREMENTS OF DUE PROCESS AND ADHERE TO ESTABLISHED INFORMAL COMPLAINT PROCESSES

A. The FCC Should Encourage The Early And Private Resolution Of Complaints At Every Opportunity.

As CTIA has previously recommended, in implementing the complaint processes required by the Act, the Commission should foster an environment that facilitates greater communication among the parties and informal resolution of concerns wherever possible.[98/] As the NPRM notes, in the *Section 255 Report and Order*, consistent with an Access Board recommendation, the Commission "encouraged consumers to express their concerns informally

---

95/ *See, e.g.*, *NPRM* ¶ 120 (discussing how to avoid imposing obligations on entities that require "multiple submissions of the same records to the Commission," even though the recordkeeping obligations of the Act impose no obligation for any such submission except in cases of complaints).

96/ *See supra*, note 61.

97/ *NPRM* ¶ 123 ("consistent with some commenter's suggestions, we propose that we should not mandate any one form in which records must be kept in order to comply with Section 717").

98/ *See* CTIA Comments at 17.

to the manufacturer or service provider before filing a complaint with the Commission."[99/] CTIA believes that this is the correct approach to resolving issues informally and in the most efficient manner.

Requiring consumers to notify covered entities before filing a complaint ensures that the covered entity has time to examine, respond to, and potentially remedy the alleged accessibility shortcoming, rather than beginning the process with the involvement of the federal government. Such an approach leads to more timely and direct handling of customers' issues, and conserves the Commission's scarce resources as well. Given that in many cases, what may be perceived as an example of inaccessibility may in fact be easily remedied by simply assisting and informing the customer of how to adjust what was thought to be a greater problem, it makes sense to promote some level of initial interaction between the consumer and manufacturer or service provider.

To ensure that both parties have the opportunity to achieve a speedy and easy resolution of a consumer's concern, the rules should require complainants to first send a pre-filing notice to the provider or manufacturer that it believes is responsible for the violation. The service provider or manufacturer should then be required to respond within thirty (30) days of receiving the notice.[100/] When filing an accessibility complaint, a complainant should be required to include a copy of its notice to the service provider or manufacturer, as well as a copy of the

---

99/ *NPRM* ¶ 128; *see also Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, ¶ 119 (1999) ("*Section 255 Report and Order*").

100/ A thirty-day response period is consistent with the response time set forth in other rules addressing responses to complaints. In the closed captioning context, for instance, if a complaint is first filed with the video programming distributor, the distributor must respond to the complainant within 30 days after receipt. If the distributor fails to respond within 30 days or the response does not satisfy the consumer, then the consumer may file the complaint with the Commission within 30 days after the time allotted for the distributor. *See* 47 C.F.R. § 79.1(g)(4).

provider or manufacturer's response. All of these steps will ensure that the Commission's time and resources are devoted only to complaints that have a need for Commission involvement, that consumers have the opportunity for their concerns to be addressed in a speedier manner than the adversarial complaint process allows, and that providers and manufacturers have an opportunity to cure any deficiencies before facing a complaint.

In addition, to ensure that complaints are received by appropriate personnel at the company (rather than, for example, a store clerk) so that they can be properly addressed, CTIA agrees with the proposal to require manufacturers and service providers to establish points of contact for complaints and inquiries under sections 255, 716, and 718.[101/] As the NPRM observes, requiring points of contact "facilitate[s] the ability of consumers to contact manufacturers and service providers directly about accessibility issues or concerns…."[102/] It is also likely that the designated points of contact will be familiar with the accessible features of its products and services, as well as skilled at troubleshooting common issues, and will be able to effectively assist the consumer in a timely manner. CTIA suggests that covered entities should provide the point of contact information on their websites so that both the public and the Commission can easily access the information.

B. Complainants Should Be Required To Meet Basic Requirements Of Due Process.

CTIA understands that the Commission wishes to facilitate the filing of accessibility complaints so that burdensome procedures do not deter a legitimate complainant from coming forward. However, the Commission's proposed procedures do not provide even basic due process protections to covered entities. These flaws must be corrected in any final rules

---

101/ *NPRM* ¶ 137; *id.*, Appendix B, Proposed Rule § 8.20(b).

102/ *Id.* ¶ 137.

1. Complaints should be required to provide some evidence of the alleged violation.

The proposed rules require that complaints contain only a narrative explanation of "why the complainant contends" a violation has occurred, with absolutely no evidentiary showing required.[103/] This is a stark deviation from basic notions of due process, as well as the Commission's practice in analogous rules. The rules for closed captioning complaints, for example, provide that the complainant must "state with specificity the alleged Commission rule violated and must include some evidence of the alleged rule violation."[104/] The rules governing complaints made under section 255, which the Commission proposes to replace, require a complete statement of fact and documentation, where available, "supporting the allegation" that a violation has occurred and "demonstrating" that a product or service is inaccessible.[105/] Complainants should, at a minimum, be able to establish that their complaint has some evidentiary basis, and should be required to include that showing, even in an informal complaint.

Given the *NPRM*'s stated intention to not include a standing requirement[106/] and the fact that parties or associations may file on behalf of others without fully knowing or having experienced the alleged accessibility deficiency, it is all the more important that the Commission require a high level of specificity as a threshold matter. It is not an unfair burden for the Commission to require that persons alleging violations provide some evidence of the violation. To the contrary, doing so provides clarity for all parties and forces complainants to consider whether the product or service actually violates the law or simply does not meet their

---

103/ *NPRM* ¶ 136; *id.*, Appendix B, Proposed Rule § 8.19(b)(4).

104/ 47 C.F.R. § 79.1(g)(1).

105/ 47 C.F.R. § 6.17(b)(5).

106/ *NPRM* ¶ 130 ("…[W]e decline to propose a standing requirement and believe the minimum content requirements we propose *infra*…will effectively deter frivolous complaint filings.").

expectations. Requiring at least a minimal level of evidence will also help prevent frivolous claims, conserve the Commission's and covered entity's resources, and may favorably serve as a catalyst for the parties to discuss alleged issues directly before involving the federal government in the earliest stages.

2. The rules should include a limitation on the complaint filing window.

Whereas in the closed captioning context "the consumer must file the complaint within sixty (60) days of the captioning problem,"[107/] after which time the distributor has thirty (30) days to respond, there is no required time window for filing complaints contained in the Commission's proposed accessibility rules. Aside from stating in the complaint the date(s) on which the equipment or service was purchased, acquired, or used,[108/] complainants have no limitation on how much time they may allow to elapse before filing a complaint. This is relevant to a complainant's claim of harm, as a significant passage of time between an alleged harm and the filing of a complaint has a tendency to suggest that perhaps the device or service was not truly inaccessible. The Commission should incorporate a timeframe starting with, the later of, the initial purchase of equipment or service, or the first instance of the perceived inaccessibility, after which time complaints may not be filed due to a lack of ripeness.

C. The Information The Commission Proposes To Require In Response To An Informal Complaint Is Grossly Excessive.

The Commission's proposed list of the information required to be included in response to an informal complaint is grossly out of proportion to the process and nearly impossible to

---

107/ *Closed Captioning of Video Programming, Closed Captioning Requirements for Digital Television Receivers*, CG Docket No. 05-231, ET Docket No. 99-254, Declaratory Ruling, Order, and Notice of Proposed Rulemaking, 23 FCC Rcd 16674, ¶ 23 (2008); *see also* 47 C.F.R. § 79.1(g)(1).

108/ *NPRM* ¶ 136; *id.*, Appendix B, Proposed Rule § 8.19(a)(3).

comply with in the proposed twenty (20) day response period.[109/] In fact, the Commission is proposing to impose all the burdens of the formal complaint process on the responding entity, without the complainant having to comply with similar procedures. This unequal burden was not contemplated by Congress, and establishes an unworkable scheme in which respondents are expected to reply with an extraordinary level of detail to what are likely to be somewhat nebulous and imprecise complaints from individuals.

The twelve-part listing of requirements to answer an *informal* complaint is objectively burdensome in its sheer amount of information requested,[110/] especially in light of the fact that some such informal complaints will lack an evidentiary basis and perhaps could have been resolved, not through onerous filings, but rather through discussions between the potential complainant and the covered entity. The Commission should modify the proposed rules as discussed below. In no circumstances should the final rules be more burdensome than the existing procedures for responding to informal complaints;[111/] nothing in the Act suggests that Congress intended the Commission to impose additional and more burdensome obligations on respondents than currently exist.

1. Requiring a "specific response to each material allegation" is inappropriate unless the complaint separately identifies such material allegations.

The Commission proposes requiring covered entities to "respond specifically to each material allegation in the complaint."[112/] The proposed informal complaint criteria, however, do not require the complainant to specify separately the material allegations, requiring only a short

---

109/ *NPRM* ¶ 138.

110/ *NPRM*, Appendix B, Proposed Rule § 8.21(a).

111/ *See* 47 C.F.R. §§ 6.17-6.20.

112/ *NPRM* ¶ 138; *id.*, Appendix B, Proposed Rule § 8.21(a)(2).

unsubstantiated narrative.[113/] It is likely to be extremely difficult to identify nebulous allegations, let alone be held to a standard of specifically responding to each of them. Equipment manufacturers and service providers cannot be expected in all cases to discern perceived allegations from a complainant's limited statement of facts. The best means of addressing this issue is to eliminate this proposed requirement.

If the Commission determines to retain this requirement, however, then it must create a complaint process with roughly symmetrical obligations. If a defendant must respond to each material allegation, then it is only reasonable that complainants should have the burden of identifying what those allegations are, and providing factual support for each such material allegation beyond the narrative. Only through clearly defined explanations of the problem can covered entities respond in the meaningful manner that is most likely to lead to resolution of complaints.

2. The proposed requirement to name "each decisionmaker" is unrelated to resolution of the complaint and is likely to hamper the goal of improving the accessibility of products and services.

The Commission proposes that answers to complaints must "set forth the names, titles, and responsibilities of each decisionmaker in the evaluation process of a specific product or service."[114/] This is a surprising requirement that is vague and feels suspiciously punitive by singling individuals out for no apparent reason. No individual can be held responsible for company decision-making, and ascertaining who contributed to a particular decision on achievability is unrelated to any determination the Commission is charged with making.

113/ Under section 255, complainants are required to provide substantially more information and support with their complaint, lessening the burden of the response requirements on the respondent. *See* 47 C.F.R. § 6.19.

114/ *NPRM* ¶ 138; *id.*, Appendix B, Proposed Rule § 8.21(a)(5).

The requirement is also exceedingly ambiguous and the Commission sets forth no criteria for defining "decisionmakers" or "the evaluation process." It is likely to be difficult to determine when an evaluation process first began, who was involved or had knowledge (if knowledge is sufficient), and how an individual's input is proximately tied to a perceived accessibility violation. The Commission does not identify how it intends to use this information, but it is easy to imagine a range of uses by complainants, arguing that employees involved in decision-making were not sufficiently senior in the company or that different people should have been involved, or seeking to depose such employees for a recitation of their part in the decision-making process.

As a result, employees with relevant technical or other knowledge at a company could be disincented from contributing their knowledge to a project for fear of being implicated as a "decisionmaker." This will result in products and services that are potentially not all they could be, in direct contrast to the goal of the Act to make accessibility considerations regular and routine parts of all discussions about product and service development. Because this proposed element to informal complaint answers has no credible basis and no apparent utility to the resolution of accessibility issues – and could affirmatively work against the goals of the Act – it should be eliminated.

3. Requiring the production of any and all documents related to a decision on accessibility is premature and an undue burden.

The Commission proposes to require the production of "all documents" related to a "conclusion that it was not achievable to make the product or service accessible and usable"[115/] in response to a complaint, without any initial determination of whether such documents are relevant to the issues raised in the complaint, whether the complaint has a sound evidentiary

115/ *NPRM* ¶ 138; *id.*, Appendix B, Proposed Rule § 8.21(a)(7).

basis, or whether the complaint even meets the basic specified criteria. Such a requirement is objectively over burdensome.

It makes no sense to require such extensive documentation in the early stages of a complaint. Under the Commission's proposed approach, the complaint might be the first time a provider or manufacturer ever hears about a concern with the product or service. Combined with the extremely short time frame for response, such a requirement is likely to result in the production of vast amounts of material that is not relevant or needed, especially at the initial filing stage for an *informal* complaint. Moreover, the requirement also is unnecessarily conclusive in nature by presuming that the manufacturer or service provider consciously decided not to make its product or service accessible, which may very likely not be the case.

Requiring covered entities to provide highly technical (and potentially sensitive) information to any member of the public who files an informal complaint opens the door to fishing expeditions from those who have not genuinely suffered any harm, but want a window into company decision-making. Before a manufacturer or service provider should be required to provide "all documents," certain other thresholds should first be met, not the least of which should be specific evidence of harm.

In place of this proposal, the Commission should adopt the procedures that it has successfully used in other contexts. The closed captioning rules, for example, reasonably provide that the Commission "shall, as needed, request additional information" after reviewing the initial complaint and response.[116/] Under this approach, once initial submissions are reviewed and a complaint is determined worthy of continued investigation, the Commission can

116/ *See* 47 C.F.R. § 79.1(g)(7).

request additional information in a targeted manner, enhancing the likelihood of successful and speedy dispute resolution.

4. A twenty-day response time is insufficient.

Providing manufacturers and providers with only twenty (20) days from the service of the complaint to answer is arbitrary and simply not enough time.[117/] In today's complex technological world, there are often multiple parties in the manufacturing and service providing chain. It takes time to identify the product or service that is causing the alleged inaccessibility, time to investigate the allegation once the relevant party is identified, time to gather information, and time to coordinate, potentially with several other groups (who likely have not been served with a complaint and thus may not have the same sense of urgency) in order to fashion a response.

To ensure a complete and accurate response, a minimum of thirty (30) days should be allowed. Utilizing at least a thirty (30)-day period is consistent with the closed captioning complaint rules and other FCC deadline contexts.[118/] Moreover, while, as discussed above, CTIA believes that the information the Commission proposes be included with an initial response is grossly excessive and should be revised, to the extent it is not, a response could take forty-five (45) days or more.

117/ *NPRM* ¶ 138; *id.*, Appendix B, Proposed Rule § 8.21(a)(1) (the answer shall "be filed with the Commission and served on the complainant within twenty days of service of the complaint").

118/ 47 C.F.R. § 79.1; *see, e.g.*, 47 C.F.R. § 68.414 (providing, in the hearing aid compatibility context, "a 30-day period after a complaint is filed, during which time state personnel shall attempt to resolve a dispute on an informal basis.").

5. Imposing unspecified "formatting" requirements is overly vague and potentially burdensome.

The Commission proposes that informal complaint answers "be prepared or formatted in the manner requested by the Commission and the complainant,"[119/] and that informal complaints be required to state the "preferred format or method of response," including traditional means, audio-cassette recording, Braille, "or some other method that will best accommodate the complainant's disability, if any."[120/] This requirement is overly vague and open-ended, and, in the overall context of the procedures proposed for informal complaints, potentially extremely burdensome, imposing additional expense and cutting into the already very short time for response provided.

The proposed rules provide undue discretion to an informal complainant, who may not even be the allegedly injured party due to the lack of a standing requirement, and should not have the ability to dictate the form and format of the response with no apparent limitations. Manufacturers and providers should not be required to create potentially costly and time-consuming tailor-made responses in an unrealistically short timeframe. If the Commission believes that additional formatting requirements are warranted, then it should identify them in advance and subject them to public comment. In no event should complainants be allowed to dictate procedural filing requirements.

119/ *NPRM* ¶ 138; *id.*, Appendix B, Proposed Rule § 8.21(a)(12).

120/ *See NPRM* ¶ 136; *id.*, Appendix B, Proposed Rule § 8.19(b)(5).

CONCLUSION

The Commission should revise its proposed rules as discussed herein.

Respectfully submitted,

/s/ *Matthew B. Gerst*

Michael F. Altschul
Senior Vice President and General Counsel

Christopher Guttman-McCabe
Vice President, Regulatory Affairs

Scott Bergmann
Assistant Vice President, Regulatory Affairs

Matthew B. Gerst
Counsel, External & State Affairs

CTIA-The Wireless Association®
1400 Sixteenth Street, N.W.
Suite 600
Washington, D.C. 20036
(202) 785-0081

April 25, 2011

APPENDIX A


CTIA Access Wireless
http://accesswireless.org/
Google
AccessWireless.org
Home
About Us
Newsroom
Site Map
Print
CTIA
Search
enter text...
Text Size: A A
Adjust Accessibility Settings
Find a Phone
Resources for Industry
Resources for Seniors
Wireless For All
Welcome to the most complete website designed to help people with disabilities, seniors and their families to find a cell phone and service! CTIA-The Wireless Association® and the wireless industry created AccessWireless.org to be your "first stop" to learn about the ever-changing world of cell phones and wireless services, and discover those that meet your specific needs.
PHONES
CARRIERS & SERVICES
MANUFACTURERS
GUIDES & HOW TOs
CTIA
The Wireless Association®
The following "Access Wireless" message is from Steve Largent, CEO and President of CTIA - The Wireless Association
00:00
00:00
Hearing
For people who need handsets with volume, text, video communication or hearing aid compatible features.
Read More
Vision
For people who need handsets with voice output, voice control or tactile features.
Read More
Mobility/Manipulation
For people who need easy to use handsets.
Read More
Speech
For people who need handsets for text-based communications.
Read More
Cognition
For people who need handsets that are easy to understand.
Read More